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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 656

JAMES MILFORD BRAZZELL, ISRAEL SEAWOOD, LUTHER LEE SMITH, THEODORE ROOSEVELT GOGGINS, ACORDY ST. CLAIR RIMES, and IDA MARIE SHARPE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 514-516) is reported at 363 F.2d 374. The opinion on rehearing (Pet. App. 22-23) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 27, 1966 (R. 518). A petition for rehearing

was denied on September 13, 1966 (R. 520-524). The petition for a writ of certiorari was filed on October 10, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a seizure of gambling paraphernalia, incidental to the arrest of two petitioners under valid arrest warrants, was proper.

STATEMENT

Petitioners were convicted in the Middle District of Florida of conspiracy to violate the federal wagering tax laws and all except Brazzell of a substantive offense. On May 21, 1965 each was sentenced to imprisonment for one year and one day (R. 458-465). As to Mrs. Sharpe all but three months of the sentence was suspended, to be followed by probation for two years (R. 465-466). On appeal (R. 467-472) the convictions were affirmed (R. 518).

The evidence showed that in September 1962 a police officer in Eustis, Florida received information from a confidential informer as to the existence of a "Cuba" or "bolita" numbers operation in Lake County, Florida (R. 41). On several dates during October 1962, surveillance of petitioner Smith's house at 715 Palmetto Street (in Eustis) revealed that paper bags and cigar boxes were regularly being carried into the house at about noon (R. 42-58). Internal Revenue agents were given this information (R. 67). After the names of certain numbers sellers

had been ascertained, a federal undercover agent made "buys" from a number of them, including petitioners Smith (R. 72-74, 76-77), Goggins (R. 77-80), Mrs. Rimes (R. 80-83), Mrs. Sharpe (R. 89-92), and Seawood (R. 100-102). As a result of the investigation, warrants were obtained for the search of the premises at 715 Palmetto Street and for the arrest of Seawood, Smith, Goggins, Mrs. Rimes, Mrs. Sharpe and several others (R. 165-167).

The agents planned to execute the search warrant on November 10 at about noon, when, according to the prior observations, the "check-up," i.e., meeting of participants in the scheme, occurred. However, on that day, surveilling agents noted that Smith and Seawood had gone to 636 Palmetto Street (R. 174-175). At about 2:00 p.m., Schilling, the agent in charge, together with the agent who had made the "buys," went to the premises at 636 Palmetto Street to execute the warrants of arrest for Seawood and Smith (R. 175-176, 199, 225). When arrested, Smith was standing at a table in the kitchen upon which there were pads and two adding machines (R. 178-180). Seawood was found hiding in a closet (R. 202, 379). Brazzell, Martin and Purser, who were at the premises, were also arrested (R. 186). The agents seized the two adding machines and numerous bags of coded lottery slips, some of which were in the living room (R. 182-185, 328). The lottery slips showed sales of numbers by various of the petitioners (R. 330, 333-336, 342-343). At about 4:00 p.m. that afternoon Smith was taken from 636 Palmetto to 715 Palmetto, where an agent served him

with a copy of the search warrant and searched the house. A box containing gambling paraphernalia (Gov. Ex. 20) was seized there, and was subsequently introduced in evidence (R. 207-211). Schilling, the Internal Revenue agent in charge of the federal investigation, testified that he did not execute the search warrant for 715 Palmetto Street at the time originally planned because there was no activity there, and that he "* * * wanted to make sure that—if I served the Warrant, I wanted to make sure that the checkup was taking place * * *" (R. 193).

ARGUMENT

In their petitions for rehearing in the court below and for certiorari in this Court, petitioners argue that, since the agents who had warrants for the arrest of Seawood and Smith could have arrested the two men before they entered the premises at 636 Palmetto Street, the delay in executing the arrest warrants invalidated the arrests and the seizures incidental thereto. The agents were not, however, required to execute the warrants of arrest at the first possible opportunity. It was not unreasonable for them to make the arrest at a time and place which would be most likely to reveal the nature of the scheme and the existence of possible confederates. *Carlo* v. *United States*, 286 F.2d 841 (C.A. 2), certiorari denied, 366 U.S. 944; *United States* v. *Lane*, 230 F.Supp. 950, 953 (S.D.N.Y.) There was no general exploratory search for evidence such as that condemned in *United States* v. *Lefkowitz*, 285 U.S. 452. Here the adding machines and gambling paraphernalia seized were in open view, and no "search" for them was necessary.

See *Davis* v. *United States*, 327 F.2d 301, 305 (C.A. 9). Thus, petitioners' basic argument—that the entry into the 636 Palmetto Street premises to execute the arrest warrants was in fact a pretext for effecting a general search of these premises without a search warrant—is without substance. *McKnight* v. *United States*, 183 F.2d 977 (C.A.D.C.), relied on by petitioners, involved not only a delayed arrest but a forcible entry without announcement of purpose.[1] Here there was a valid arrest warrant, validly executed at a place where the men to be arrested were known to be. The fact that the agents had a search warrant for another premises does not mean that they could not make any seizures at the place where they made the arrests.[2] The seizure was incidental to those valid arrests, and was thus plainly proper. *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145; *Leahy* v. *United States*, 272 F.2d 487 (C.A. 9), certiorari dismissed, 364 U.S. 945.[3]

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[1] In denying a petition for rehearing, the court below found petitioners' reliance on *McKnight* "without merit under the totally different facts and circumstances in this case * * *" (Pet. App. 22-23).

[2] Otherwise, the government would in effect be penalized for having taken the step of obtaining a search warrant for the other premises.

[3] Unlike petitioners in *Costello* v. *United States*, No. 41, this Term, and the related cases presently pending on petitions for certiorari, petitioners in this case do not assert any Fifth Amendment questions as to the constitutionality of the wagering tax laws under which they were convicted; nor did they preserve their right to do so by raising such questions in the courts below.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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